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IN THE

Supreme Court of the United States

No. .....
October Term 1975

No. 74-1580

MARIO LOBO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

RETURN TO SUA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALBERT J. KRIEGER
Attorney for Petitioner
401 Broadway
New York, N.Y. 10013
(212) WA 5-5937

JOSEPH BEELER
Attorney for Petitioner
2829 Bird Avenue
Coconut Grove
Miami, Florida 33133
(305) 448-0711

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel.: (212) 447-5358

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The petitioner, Mario Lobo, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 14, 1975.

Opinion Below

The opinion of the Court of Appeals (App. A *infra*) is not yet reported. No opinion was rendered by the District Court for the Eastern District of New York.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on May 14, 1975 (App. C, *infra*). This Court's jurisdiction is invoked under Title 28 U.S.C. §1254 (1).

Question Presented

Whether the inference of a defendant's guilt arising from the admissions of a co-defendant (in this case the mid-trial flight of a co-defendant in response to testimony inculpating both defendants together) must be "clear and practically inescapable" — or instead only "pose a substantial threat" to the defendant's rights of confrontation — before limiting instructions to the jury will be deemed inadequate under *Bruton v. United States*, 391 U.S. 123 (1968).

Statutes and Rules Involved

Rule 14 of the Federal Rules of Criminal Procedure provides:

RELIEF FROM PREJUDICIAL JOINDER

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide

whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

Statement of the Case
Nature of the Case and Its Disposition

A one-count superceding indictment was filed on May 8, 1974, charging that petitioner conspired with five co-defendants and other unindicted co-conspirators during 1969 and 1970 to violate narcotics laws. 21 U.S.C. §§173 and 174. He and co-defendant Aurelio Martinez-Martinez commenced trial together* in the United States District Court for the Eastern District of New York before Chief Judge Jacob Mishler and a jury. Following the testimony of several government witnesses, co-defendant Martinez-Martinez failed to appear and was thereafter tried *in absentia*. (The Court also permitted evidence of his flight and allowed argumentation and gave instructions that such flight was probative of his consciousness of guilt, all over objection of petitioner Lobo). The jury found both Martinez-Martinez and petitioner guilty.

On January 17, 1975, petitioner was sentenced to 15 years' imprisonment and fined $20,000. Sentencing of co-defendant Martinez-Martinez, who has still not reappeared, is adjourned indefinitely. There is no officially reported judgment or opinion of the District Court in this case.

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* The remaining co-defendants were never arrested.

On May 14, 1975, the Court of Appeals affirmed the conviction.

Statement of the Facts

1. At the outset we note that no sufficiency of the evidence issue has been or is now raised. Basically, the government's case depended on the bargained for and impeached testimony of several self-confessed accomplices agreeing, in the prosecutor's opening words, "to cooperate with the government for one reason and one reason alone, . . . to try to save their own skins." (Tr. 38) The prosecutor in summation again conceded that the credibility of its witnesses was the most important thing the jury would be called upon to decide (Tr. 1600) and the trial court so instructed: "All the parties agree that this case or the outcome of this case will turn on the credibility of witnesses". (Tr. 1667) Thus, petitioner's statement of facts does not rehearse the evidence at any great length but instead attempts a brief overview focusing in any detail only on those facts directly relevant to the issues raised herein. Such further facts as necessary are stated in the argument in the Reasons for Granting the Writ.

Pierre Gahou, a self-confessed heroin trafficker serving a seven-year sentence testifying under threat of prosecution for non-cooperation and under promise of freedom from further prosecution for cooperation (Tr. 78, 193), appeared as the government's first witness. In July of 1969 he was living in Paraguay with one August Ricord. He agreed to act for Ricord in arranging delivery of a shipment of narcotics in New York City. After being introduced to a

man by the name of Mitto who, he was advised, would rendezvous with him in New York and assist him in his duties there, Gahou departed for the United States.

Gahou arrived in Miami, traveled to New York, and located Mitto. After some delay he also located one Jean Claude, as instructed, who had previously arrived from France with a Peugeot. Shortly he encountered the defendants, petitioner Mario Lobo and his co-defendant, Aurelio Martinez-Martinez, who were allegedly the American buyers of the 30 kilograms of heroin secreted in the auto. Gahou testified that as things turned out petitioner and Martinez-Martinez were asked to help in the dismantling of the Peugeot. A garage was located and he, Jean Claude (also known as Gerald Nobile), Mitto, petitioner and Martinez-Martinez proceeded there where Martinez-Martinez then took charge of ferreting the heroin out of the car. During the five hours of this probe Mitto and petitioner were absent from the garage, apparently in a nearby tavern.

As a result of the delivery of the heroin Gahou was given $20,000 by Mitto and returned to Paraguay. Ricord was unhappy with this part-payment and sent Gahou back to the United States several more times. Gahou testified that on the first return trip he saw Mitto, petitioner and Martinez-Martinez conversing together, and that on the next he met with Martinez-Martinez and discussed the payment as well as the prospect of future direct transactions. On his last trip, which was to Miami, Gahou was supposedly given overnight custody of $200,000 in cash by Mitto, intended as final payment for the 30 kilos. In the morning Mitto retrieved the money and apparently

accomplished independent delivery of it to Ricord (Tr. 77-193).

The prosecution was able to corroborate a few evidential details of Gahou's travels with such as passport and hotel records.

On cross-examination Gahou admitted, or claimed, perjury at a previous federal trial [of August Ricord]. There Gahou had purported to testify as to the very same events in question in the instant case. Among the differences were Gahou's claim in the earlier trial that Ricord had sent him to America in July of 1969 to meet with one Alberto Marchetti (Tr. 284-306). Gahou claimed that this original complete co-operation was not in fact complete but that when threatened with further prosecution he then told everything true including, for the first time, the facts inculpating petitioner and Martinez-Martinez (Tr. 318-323).

Alfredo Aviles, a habitual offender who purported to cooperate with the government in 1972 when he had four separate narcotics felony cases pending against him, was another principal witness for the government. As a result of his co-operation he was free on a suspended sentence (Tr. 419-423). He testified in substance that starting about the summer of 1969 and ending in December he began to purchase a series of 15 one kilo lots of heroin. At first they were delivered by Martinez-Martinez and then by Martinez-Martinez together with petitioner (Tr. 418-442).

Aviles' testimony is not externally corroborated and upon cross-examination it was revealed, among other things, that the two years of his co-operation with federal authorities has not produced one prior interview statement

of Aviles concerning his alleged dealings with petitioner and Martinez-Martinez.

Following Aviles' testimony, co-defendant Martinez-Martinez failed to appear at the next court session. Counsel for petitioner Lobo objected to going forward without a severance (Tr. 697). And, when the trial court intimated it would allow proof of flight to the jury and instruct as to the inference of guilt, counsel for petitioner objected strenuously:

> "MR. KRIEGER: That really blows Mario Lobo right out of the courtroom, if your Honor please. There is a horrendous fact, post-conspiracy, four years post-conspiracy, four and a half years post-conspiracy for which he is going to be held accountable." (Tr. 704)

Subsequently, over further and continued objection, the prosecution was permitted to show that on November 7, 1974, Martinez-Martinez left the New York Hilton and was not heard from thereafter. It showed that just prior to this disappearance Martinez-Martinez had discussed the upsetting testimony of Aviles with Julio Ferrer, a defense investigator who had accompanied Martinez-Martinez to the trial and who was sharing a hotel room with him. Counsel for Martinez-Martinez on cross-examination of Ferrer attempted to show that Martinez-Martinez had started to repeat himself, lost his sense of humor, and became absent-minded and disoriented near the time of the trial. (Tr. 1176-1199). And counsel attempted, with questionable success, to lead Ferrer into testifying that Martinez-Martinez had specifically said the Aviles testimony "was a pack of lies" (Tr. 1187). The Court elicited from Ferrer that Martinez-Martinez had stated

"Aviles couldn't testify here against him as to those occasions that they met in the time alleged in the indictment because at the time alleged in the indictment Mr. Aviles was supposed to be in jail and couldn't be out in the street" and that Martinez-Martinez had insisted upon this view even after Ferrer investigated and informed him it was not the fact (Tr. 1189-1190).

And the Court instructed the jury on several occasions that if proof of knowing and intentional flight were established, the jury permissibly could infer that the flight resulted from Martinez-Martinez's consciousness of guilt (E.g., Tr. 1170), but that such evidence must not be considered against petitioner Lobo (E.g., Tr. 1171).

Meanwhile, following Martinez-Martinez's flight, Felix Martinez, a four-time loser in narcotics cases who had decided to become a co-operating individual, was called to testify (Tr. 712-714).

Felix Martinez testified that in November of 1969 he was put in touch with petitioner through one George Warren Perez (who ran a travel agency) and that as a result, an appointment was made at Perez's office where Felix Martinez and petitioner met. Martinez-Martinez accompanied petitioner. Felix Martinez already knew Martinez-Martinez by the name of Julio or El Nino. Felix Martinez testified that the three of them shortly agreed on a narcotics deal. Eventually, Felix Martinez sold the pair two two-kilo lots of heroin, with Martinez-Martinez taking care of the physical arrangements (Tr. 712-743).

On cross, among other things, we learn that Felix Martinez had once paid $120,000 to fix his own narcotics case (Tr. 749) and obtained a 90-day "license" to traffic in

narcotics without fear of being arrested by City Police (Tr. 753).

Finally, George Warren Perez, who had also been convicted of involvement in a large quantity of heroin (Tr. 884), testified that in approximately November of 1969 Felix Martinez came to his travel agency looking for heroin buyers. Perez says he mentioned petitioner Mario Lobo and arranged a meeting which was attended by Martinez, petitioner and a man whose photograph had been identified by Felix Martinez as Martinez-Martinez's. Assertedly, after the three met, petitioner told Perez that he had made a deal (Tr. 883-890).

On cross, again, among other things, it developed that Perez's memory of this event had been prompted and reconstructed by Felix Martinez.

2. The Court of Appeals affirmed petitioner's conviction. It said both that Martinez-Martinez's decision to flee implied the guilt of no one but himself (App.) and that the inference of petitioner's guilt was "insubstantial" (App.). It concluded that, under the Second Circuit test, limiting instructions can be relied upon to overcome confrontation clause violations, despite the teachings of *Bruton v. United states*, 391 U.S. 123 (1968), unless the inference of a defendant's guilt is "clear and practically inescapable".

Reasons For Granting The Writ

A

Introduction and Summary

Petitioner Lobo's conviction was obtained at a joint trial the most dramatic and, we submit, for the jury, unforgettable feature of which was the flight of his sole co-defendant (and alleged "lieutenant" (Tr. 1648)) after hearing the prosecution's first two principal witnesses against them. The trial of course proceeded in co-defendant Aurelio Martinez-Martinez's absence. But rather than leave bad-enough alone, the prosecution seized upon and exploited this unexpected occurrence — at the expense of petitioner.

Despite the prosecution's knowledge that Martinez-Martinez and petitioner were practically wed as defendants, it adduced as evidence of guilt that Martinez-Martinez had intentionally and knowingly fled the trial and, moreover, that this guilty flight occurred following the testimony of a witness, Aviles, which testimony inculpated both defendants (E.g., Tr. 432-433, 437-443) and which, by extrajudicial declaration, "kind of upset" Martinez-Martinez (Tr. 1176). The prosecutor banged home in summation that the flight was proof Martinez-Martinez "Knew in his own mind that he was guilty of the charge". (Tr. 1646) And the prosecutor also convinced the trial court itself to instruct the jury immediately prior to admission of the flight testimony that "you may infer from such testimony together with all the other evidence, a consciousness of guilt. In other words, that the party fleeing felt he was guilty of the crime charged" (Tr. 1170)

and to similarly instruct them in the main charge.*

This emphasis upon guilty flight was not lost on the jury which interrupted its deliberations to request, *inter alia*, that the Court read them the testimony concerning the comments Martinez-Martinez made on the eve of his flight (Court Exhibit 6) (Tr. 1717) as well as the preceding testimony of Aviles inculpating both Martinez-Martinez and petitioner (Tr. 1747), requests granted by the Court (Tr. 1733, 1747).

After the precipitous flight of Martinez-Martinez apparently affirming the truth of the testimony he had heard, the prosecution's rapacious evidentiary and argumentative exploitation of the flight as an admission by conduct, and the trial court's instructions approving its probative value, the jury which convicted both Martinez-Martinez and petitioner could certainly not be presumed to have performed the "mental gymnastic" of insulating petitioner Lobo from the probative force of his "trusted man[s]" (Tr. 733) flight. *Bruton v. United States*, 391 U.S. 123, 132 n.8 (1968) quoting Circuit Judge Learned Hand in *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932). That is, the "powerfully incriminating" conduct of co-defendant Martinez-Martinez who stood accused "side-by-side with the defendant" "posed a substantial threat to [petitioner Lobo's] right to confront the witnesses against him, and this is a hazard we cannot ignore". *Bruton v. United States*, 391 U.S. at 135-137. We therefore conclude, as did this Court in *Bruton*, that "[d]espite the

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* The complete instructions given the jury on the subject of the co-defendant's flight may be found at Tr. 1169-1172, 1644-1645, and 1662-1664.

concededly clear instructions to the jury to disregard [co-defendant's] inadmissible hearsay evidence inculpating [defendant], in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for [defendant's] constitutional right of cross-examination. The effect is the same as if there had been no instruction at all." *Id.* at 137 (citations omitted). Petitioner's right to a fair trial was prejudiced by the "substantial threat" to his right of confrontation posed by the uncalled for emphasis of his co-defendant's flight, and his conviction should be reversed. *Bruton v. United States*, 391 U.S. 123, 137 (1968).

But the Second Circuit Court of Appeals requires more than circumstances posing a "substantial threat" to the defendant's right to confront the witnesses against him. Following its own decision in *United States v. Sparano*, 422 F.2d 1095, 1099 (2d Cir. 1970), the court below held that to constitute a violation of *Bruton* the inference of a defendant's guilt arising from the unconfronted behavior of a co-defendant "would have to be clear and practically inescapable" (App.). Certiorari should be granted to reinstate the "substantial threat" rule announced in *Bruton* and to rectify the decisions in the Second Circuit, and other Circuits, which have nearly limited *Bruton* to its own facts.

B.

THE PROOF, ARGUMENT AND JURY INSTRUCTIONS EMPHASIZING CO-DEFENDANT MARTINEZ-MARTINEZ'S MID-TRIAL FLIGHT AS EVIDENCE OF CONSCIOUSNESS OF GUILT UNDER THE CIRCUMSTANCES PRESENT HEREIN POSED A "SUBSTANTIAL THREAT" TO PETITIONER'S CONFRONTATION RIGHTS AND THEREFORE THE TRIAL COURT'S ADMONITIONS THAT THE JURY LIMIT THE PROBATIVE FORCE SOLELY TO MARTINEZ-MARTINEZ WAS AN INADEQUATE SAFEGUARD UNDER BRUTON v. UNITED STATES, **EVEN IF THE INFERENCE OF PETITIONER'S GUILT ARISING FROM THE CO-DEFENDANT'S FLIGHT IS NOT "CLEAR AND PRACTICALLY INESCAPABLE".**

As Mr. Justice Black stated for this Court in *Pointer v. Texas*, 380 U.S. 400, 405 (1965):

> "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

See also, *Davis v. Alaska*, 415 U.S. 308 (1974) (Burger, C.J.); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (Powell, J.); *Turner v. Louisiana*, 379 U.S. 466 (1965) (Stewart, J.).

Nor can there be any dispute that petitioner was denied both the right to confront his disappeared co-defendant Martinez-Martinez in a physical sense and, more importantly, the right to cross-examine him as to his flight, the fact of it, its purport, its relationship to the Aviles testimony, its purpose, whether it reflected a consciousness of guilt and, if so, individual guilt or joint guilt. The absence of Martinez-Martinez precluded cross examination just as effectively as did the adherence to the privilege against self-incrimination by the co-defendant in *Douglas v. Alabama*, 380 U.S. 415 (1965).

The teachings of *Bruton v. United States*, 391 U.S. 123 (1968) were properly and timely urged to the trial court (Tr 697-698, 704-707, 982-985, 1087-1088, 1160, 1635-1645, 1696-1697) and the court of appeals below. As a consequence of the rigid test by which the Second Circuit has throttled *Bruton*, it found the prejudice to petitioner "insubstantial" (App.). But by the test of *Bruton* the threat posed to petitioner's confrontation rights can only be regarded as substantial.

To begin with, the testimony concerning Martinez-Martinez's flight was admitted against him on the premise that it amounted to a party admission (Tr. 1007, 1027, 1087). There can be no disagreement that "[m]any acts of a defendant after the crime seeking to escape the toils of the law are uncritically received as admissions by conduct, constituting circumstantial evidence of consciousness of guilt and hence of the fact of guilt itself." McCormick *Evidence* §271 at p. 655 (2d Ed. 1972). "Flight from justice, and its analogous conduct, have always been deemed indicative of a consciousness of guilt." 2 Wigmore, *Evidence*, §276 at p. 111 (3d ed. 1940). Similarly, there can

be no disagreement that "[t]he flight of *another person* is relevant so far only as the accused has connived at it; . . . ." *Id.*, §276, at p. 116 (emphasis in original). And certainly petitioner did not connive at Martinez-Martinez's flight nor was the flight an act in furtherance of or during the pendency of the alleged conspiracy and thus chargeable to petitioner. See *Fiswick v. United States*, 329 U.S. 211 (1946).* Thus, the testimony concerning Martinez-Martinez's flight was offered as and constituted an implied confession of guilt admissible in theory only against Martinez-Martinez. The jury was permitted to infer that Martinez-Martinez, preyed upon by his guilt, and confronted by his accusers, bolted Justice. "The wicked flee where no man pursueth."

But in fact the implied confession could only taint petitioner as well as Martinez-Martinez. Unfortunately, the co-defendants did not pretend each other's non-existence at trial, as Judge Mishler made of record:

> "MR. KRIEGER: Because in Bruton—under Bruton the Government couldn't put a witness on the stand to say that Martinez[-Martinez] admitted guilt.
>
> THE COURT: But the Government could put a witness on the stand who said Martinez[-Martinez] admitted guilt without implicating the other co-defendant.
>
> MR. KRIEGER: But in these circumstances it is going to implicate him because they see the two of them sitting together, your Honor.
>
> THE COURT: Well, if they are sitting close together during the trial or if they walk out of the

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* To further narrow the area of dispute, it should be clear that this petitioner does not contest the trial court's power to try his co-defendant *in absentia*. *Taylor v. United States*, 414 U.S. 17 (1973). The only question is, what kind of a trial is consonant with petitioner's own rights.

courtroom together, or if you see them in conversation all through the trial together it is not the Court's fault. That is their choice.

MR. KRIEGER: Of course they will be together. What was there going to be, a subterfuge practiced? That's nonsense. Where you go into a trial and the defendant says, "Say you don't know me," something like that.

THE COURT: Why not that concept? I have seen that practiced. I have seen cases where co-conspirators who were lifetime buddies and who wouldn't sit together or talk together during the trial. But I see you are talking about what the jury will look at and what the jury will see. I am telling you that the jury has seen Mr. Lobo—I have seen him so I assume the jury has—talk to each other. They never left one another when they left the courtroom. They always came in together when they came into the courtroom. And if that is the kind of prejudice you are talking about I say this was the making of the defendants." (Tr. 705-706).

Worse than the apparent inseparability of the two defendants at trial, however, is the inseparability of the evidence offered against the two. If Martinez-Martinez's flight was taken as a confession of guilt, it was inherently and necessarily a confession of guilt to the alleged conspiratorial conduct of the two, for the prosecutions's witnesses seemed to chorus that wherever Martinez-Martinez went petitioner was sure to follow. For more precise example, Felix Martinez claimed that Lobo referred to co-defendant Aurelio Martinez-Martinez expressly as his "trusted man" (Tr. 733). And if the government evidence did not tend enough to tie the pair together, the prosecutor's summation knotted them beyond the power of any mere limiting instruction to unravel:

"I suggest to you, Ladies and Gentlemen, that the beauty of our case is that Mr. Martinez-Martinez acted as Mr. Lobo's lieutenant, that Mr. Lobo did not handle narcotics, that Mr. Lobo had Aurelio Martinez-Martinez to handle the narcotics, that Mr. Lobo was close to the situation when it came to the transfer of narcotics, but not too close, that Mr. Lobo was the man who wanted to make sure that the operation was functioning smoothly, but at all times sensitive to his own well-being.

And that Mr. Martinez-Martinez was the person, when necessary, that was dispatched by Mr. Lobo to either receive the narcotics, or to conduct the actual dealings which involved the possession of the narcotics.

And, Ladies and Gentlemen, what it all adds up to, I suggest to you, and what all the testimony that you have heard in this trial means, is that Mario Lobo and Aurelio Martinez-Martinez were engaged together for their own mutual profit in a Conspiracy to traffic in heroin; that during an eminently fair trial, evidence was developed which proves their complicity—by "their," I mean Mr. Lobo's and Mr. Martinez-Martinez's complicity—with Pierre Gahou, with Freddie Aviles, with George Warren Perez and with Felix Martinez, and with others, beyond all doubt; and on the basis of that evidence, Ladies and Gentlemen, and for no other reason, we ask you to find Mr. Lobo and Mr. Martinez-Martinez guilty as charged." (Tr. 1648-49)

Worse for petitioner even than the prosecution's casting the two defendants as partners in crime, however, is the particular adhesive of the Aviles testimony. Aviles inculpated both petitioner and Martinez (see Tr. 425, 432-433, 437-443) specifically stating that once petitioner first came to his apartment with Martinez-Martinez thereafter they "practically always" used to come together (Tr. 439). The purpose of these alleged trips to Aviles' apartment, of

course, was the joint delivery of about nine or ten separate kilos of heroin or the collection of money in payment for the transactions (See Tr. 431-433, 438-440). Thus, the circumstance of Martinez-Martinez's flight taking place immediately following this testimony was doubly damning.

And, the government's evidence of flight emphasized that it was the Aviles testimony which lit Martinez-Martinez's fuse (Tr. 1176-1177). The prosecutor specifically and purposefully elicited from Ferrer that Martinez-Martinez knew Aviles, that Martinez-Martinez on the night of his departure had a conversation with Ferrer concerning the testimony of Aviles, and that he told Ferrer he was "kind of upset about Mr. Aviles testifying against him" (Tr. 1176). Finally, in summation the prosecutor attempted to argue that Martinez-Martinez's flight in face of the Gahou and Aviles testimony was "strong evidence" that "these witnesses in fact told the truth" (Tr. 1632) and upon defendant's objection (Tr. 1633-1644) the court attempted to instruct the jury to shut its mind off to this particular probandum of the flight evidence (Tr. 1644-1645).

But we submit that whatever the verbal clarity of this limiting instruction may have been, the court was simply asking too much of the jury. As stated by Judge Friendly in *United States v. Bozza*, 365 F. 2d 206, 217 (2nd Cir. 1966), " . . . there is a point where credulity as to the efficacy of such instructions with respect to a confession implicating co-defendants is overstrained, and . . . this point was reached here."

In the context we have described herein the natural and ineluctable probative force of Martinez-Martinez's flight

was to signal an affirmation of the truth asserted in Aviles', and probably also Gahou's, testimony. The court's admonitions to draw inferences only against Martinez-Martinez and not against his partner and only as to Martinez-Martinez's guilt and not as to the veracity of his accusers most probably, indeed, almost certainly amounted to "a futile collocation of words" and thus failed its purpose to steer the jurors' mental processes through the shoals. *Bruton v. United States*, 391 U.S. 123, 129 (1968), quoting Mr. Justice Frankfurter dissenting in *Delli Paoli* v. *United States*, 352 U.S. 232, 246, 247 (1957).

In this case, the proof of the pudding is in the deliberations. The jury interrupted its deliberations to request, *inter alia*, that the Court read it the testimony of the comments Martinez-Martinez made on the eve of his flight (Tr. 1717). Compare *United States v. Bozza*, 365 F. 2d 206, 216-217 (2nd Cir. 1966) (Friendly, J.). The jury's telltale note is replicated below, completed with its original editing:

> "Ferrar—
> Testimony concerning the comments Mr. Martinez-Martinez made on the night of Thursday November 7th." (Court Exhibit 6)

And reinforcing this graphic proof that the jury was at least subliminally bewitched by Martinez-Martinez's reaction to the Aviles testimony (See Tr. 984)—and that this reaction was doubly damning—is the jury's request shortly afterwards for testimony of conversations and events at Aviles' apartment *only* when *both* Lobo and Martinez Martinez were present there (Tr. 1747). Peculiar.

We cannot and do not pretend to psychoanalyze the jury deliberations. Nonetheless, we unhesitatingly suggest that

the deliberations at minimum spawn "real doubt . . . that at least some of [the jurors] 'failed to follow the court's instructions' ". *United States v. Bozza*, 365 F. 2d at 216.

And, under all the foregoing facts—including the inseparability of the defendants, the inseparability of the evidence against them, and the exceptional bond of Aviles' testimony—it must be concluded that the evidence of Martinez-Martinez's flight was "clearly inculpatory" of petitioner Lobo, as well as Martinez-Martinez, *see United States v. Cassino*, 467 F. 2d 610, 623 (2nd Cir. 1972), *cert. denied*, 410 U.S. 928 (1973), whether he directly "pointed the finger" at petitioner or not. *See Chambers v. Mississippi*, 410 U.S. 284, 297-298 (1973). *Cf., Douglas v. Alabama*, 380 U.S. 415, 419 (1965); *Harrington v. California*, 395 U.S. 250, 253 (1969).

The devastating impact on petitioner's trial of emphasizing Martinez-Martinez's flight cannot be gainsaid. As trial counsel argued, such circumstnces have "intense traumatic value" (Tr. 697). First, the courtroom drama is shocked out of its routine by a real life happening: a fleeing defendant. Second, here the ensuing testimony stitching the two defendants together in alleged past events must have continually directed the jury's attention to the now empty chair haunting the courtroom as a reminder of the guilty flight. Indeed, every action by co-defendant's counsel must have served as a reminder. And, third, the specific proof of, argument about, and instructions on the Martinez-Martinez disappearance surely kept the wound open. We even have here some specific evidence that the trauma reached into the juryroom itself, a showing of prejudice greater than normally is required for recognition of confrontation rights.

Ordinarily, an extreme inherently prejudicial situation *Turner v. Louisiana*, 379 U.S. 466, 473 (1965), or a "substantial threat" to the defendant's confrontation rights, *Bruton v. United States*, 391 U.S. 123, 137 (1968), is sufficient. We note further that the instant jury deliberated between 11:45 a.m. (Tr. 1713) and 7.30 p.m. (Tr. 1757) over the fate of these two defendants. Compare *United States v. Bozza*, 385 F. 2d 206, 210 (1966) (jury deliberated three and one-half hours over six defendants). Even the trial court recognized some prejudice to Lobo (Tr. 1087). On the totality of the circumstances herein, the court surely cannot declare the confrontation error was "harmless beyond a reasonable doubt", *Harrington v. California*, 395 U.S. 250, 251 (1969), and therefore petitioner's conviction should be reversed.

There is a further consideration in the balance. Although a lay jury may well be greatly impressed by a defendant's flight from the Halls of Justice, such evidence is of questionable scientific reliability. Professor McCormick has commented:

> "However, in many situations, the inference of consciousness of guilt of the particular crime is so uncertain and ambiguous and the evidence so prejudicial that one is forced to wonder whether the evidence is not directed to punishing the 'wicked' generally rather than resolving the issue of guilt of the offense charged." McCormick, *Evidence*, §271 at 655 (2d ed. 1972) (footnotes omitted).

See also Wong Sun v. United States, 371 U.S. 471, 483, n. 10 (1963). And the unreliability of the evidence of course is compounded when the effect is to spill over prejudice on a co-defendant without benefit of confrontation. *See Bruton*

v. United States, 391 U.S. 123, 136 (1968). On the other hand, the government's need to rely on such evidence at this joint trial was minimal. That is to say, the evidence of Martinez-Martinez's flight was no part of the grand jury presentation and no part of the prosecutive decision to take the case to trial. In a sense, it was an option inherited by the prosecutor only upon Martinez-Martinez's departure. But it should not have been exercised at petitioner's expense. "The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." *Bruton v. United States*, 391 U.S. 123, 129 (1968), quoting Mr. Justice Frankfurter dissenting in *Delli Paoli v. United States*, 352 U.S. 232, 246, 248 (1957). In other words, under the circumstances the inherent prejudice of the evidence tended to outweigh the legitimate probative value, further fuel for reversal.

Indeed, an existing "viable alternative" both to infringing the defendant's right of confrontation by relying on the placebo of limiting instructions and to severing the trial, *see Bruton v. United States*, 391 U.S. at 133, was evident. As stated in *United States v. Bozza*, 365 F. 2d 206, 217 (2d Cir. 1966): ". . . we think the circumstances here were such as to put the Government to the choice . . . either to accept a severance of the trial . . . or forego use of the [evidence]." Because the government failed to forego the evidence and would not accept a severance, it owes petitioner Lobo a new trial. *United States v. Bozza supra; Bruton v. United States, supra.*

The confrontation Clause standard exacted by the Second Circuit, requiring a "clear and practically

inescapable" inference of the petitioner's guilt from the co-defendant's behavior, represents more than a departure from *Bruton, Turner v. Louisiana, supra, Douglas v. Alabama, supra.* It is a practically impossible standard which *sub silentio* overrules *Bruton.* The hearsay even of a co-defendant's confession is rarely "inescapable"* given leeway to speculate as the court of appeals below permitted itself, but the threat posed to the inculpated defendant's rights of confrontation is nonetheless "substantial". This Court should grant certiorari either to reinstate the standard proclaimed in its own decisions or to announce forthrightly that *Bruton v. United States* establishes an exception rather than the rule.

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* Defendants can always argue the unreliability of accomplices and the tendency to shift blame to others, "escapes" which the Court in fact contemplated in deciding *Bruton*, 391 U.S. at 136.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

ALBERT J. KRIEGER
Attorney for Petitioner
401 Broadway
New York, N.Y. 10013
(212) WA 5-5937

JOSEPH BEELER
Attorney for Petitioner
2829 Bird Avenue
Coconut Grove
Miami, Florida 33133
(305) 448-0711

Appendix

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1031—September Term, 1974.

(Argued May 13, 1975 Decided May 14, 1975.)

Docket No. 75-1034

UNITED STATES OF AMERICA,

Appellee,

v.

MARIO LOBO,

Defendant-Appellant.

Before:

KAUFMAN, *Chief Judge,*
OAKES, *Circuit Judge,* and JAMESON, *District Judge.**

Appeal from judgment of conviction entered by the United States District Court for the Eastern District of New York, Jacob Mishler, *J.*, for narcotics violations.

Affirmed.

ALBERT J. KRIEGER, New York, New York, *for Appellant.*

PAUL B. BERGMAN, Assistant United States Attorney, Eastern District of New York, *for Appellee.*

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* Of the District of Montana, sitting by designation.

PER CURIAM:

Lobo's sole ground for appeal is based on the flight during trial of his codefendant, Aurelio Martinez-Martinez. After declaring Martinez-Martinez's $100,000 bail forfeit, Judge Mishler permitted the joint trial to proceed, and the jury convicted Lobo and Martinez-Martinez *in absentia*. The jury was properly instructed that although flight is probative of guilt, evidence of the flight should be considered only against Martinez-Martinez. Lobo contends that the limiting instruction was inadequate in light of *Bruton* v. *United States*, 391 U.S. 123 (1968), where a limiting instruction was held insufficient to dispel the prejudice resulting from a hearsay confession of a defendant inculpating his codefendant.

We fail to see, however, that Martinez-Martinez's decision to flee implied the guilt of anyone but himself; indeed, Lobo's continued presence, by contrast, might have been viewed by the jury as belief in his own innocence. It seems clear that *Bruton* has no application to hearsay utterances of a defendant[1] that do not inculpate a codefendant. *United States* v. *Mulligan*, 488 F.2d 732, 737 (9th Cir. 1973), *cert. denied*, 417 U.S. 930 (1974); *United States* v. *Davis*, 487 F.2d 112, 124 (5th Cir. 1973), *cert. denied*, 415 U.S. 981 (1974); *United States* v. *Lomprez*, 472 F.2d 860, 863 (7th Cir. 1972), *cert. denied*, 411 U.S. 965 (1973). *See also United States* v. *Deutsch*, 451 F.2d 98, 116 (2d Cir. 1971),

1 While a flight, even though nonverbal conduct, has been said to be an assertion (in the form of an admission) of guilt and is therefore treated by some authorities as an exception to the hearsay rule, *see* McCormick §§ 250, 271 (2d ed. 1972), it is treated in the Federal Rules of Evidence, App. foll. 28 U.S.C., Rule 801(a) as a "statement" but because it is an admission as "not hearsay," Rule 801(d)(2)(A). *See* Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. Pa. L. Rev. 484, 564, 573, 576 (1937). Preferably it is to be viewed as conduct offered as circumstantial evidence rather than for its assertive, testimonial value. *See* Strahorn, *supra*; McCormick, *supra*, § 262 at 628-29.

cert. denied, 404 U.S. 1019 (1972); *United States ex rel. Nelson* v. *Follette*, 430 F.2d 1055 (2d Cir. 1970), *cert. denied*, 401 U.S. 917 (1971); *United States* v. *Cusumano*, 429 F.2d 378, 381 (2d Cir.), *cert. denied*, 400 U.S. 830 (1970); *United States* v. *Tropiano*, 418 F.2d 1069, 1080-81 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970); *United States ex rel. LaBelle* v. *Mancusi*, 404 F.2d 690 (2d Cir. 1968).

Thus, Lobo's argument is reduced to the claim that his fate and that of Martinez-Martinez were so inextricably linked that evidence of Martinez-Martinez's guilt implied his own guilt as well. It is plain that in the circumstances present here, the inference is insubstantial, *see Bruton*, *supra*, 391 U.S. at 135-36, and the jury could easily disregard it under the proper limiting instruction given by Judge Mishler. As we said in *United States* v. *Sparano*, 422 F.2d 1095, 1099 (2d Cir. 1970):

> We agree and hold that, to constitute a violation, the inference [of defendant's guilt] would have to be clear and practically inescapable.

Lobo has failed to make such a showing here.

Affirmed.

JUDGMENT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Fourteenth day of May, one thousand nine hundred and seventy-five.

PRESENT:

HON. IRVING R. KAUFMAN, Chief Judge
HON. JAMES L. OAKES, Circuit Judge
HON. WILLIAM J. JAMESON, District Judge

(TITLE)

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO, Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

Filed June 9, 1975